FOREST SERVICE
U.S. DEPARTMENT OF AGRICULTURE
(HEIRS OF ARCHIE LAWRENCE)

IBLA 92-529 Decided March 11, 1994

Appeal from a decision of the Alaska State Office, Bureau of Land Management, reinstating Native allotment application A-02493.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

A Native allotment application that was rejected in 1925 without giving the applicant an opportunity for hearing on a disputed question of fact was properly reinstated in 1980. Because neither the applicant nor his heirs ever amended the application, it was correct to reinstate the 160-acre tract originally claimed although the Department had surveyed a smaller tract in 1921 and though, immediately following rein- statement, the smaller tract was noted on the master title plat.

APPEARANCES: William G. Edwards, Director of Lands, Minerals, and Watershed Management, Forest Service, U.S. Department of Agriculture, Juneau, Alaska, for the Forest Service; Carlene Faithful, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Forest Service, U.S. Department of Agriculture, has appealed from a June 1, 1992, decision of the Alaska State Office, Bureau of Land Management (BLM), reinstating Native allotment application A-02493 by the heirs of Archie Lawrence. The Lawrence application was originally filed on September 7, 1915, pursuant to the Act of May 17, 1906, 34 Stat. 197 (which as amended by section 1(a) through (e) of the Act of Aug. 2, 1956, ch. 891, 70 Stat. 954, was codified at 43 U.S.C. §§ 270-1 through 270-3 (1970) and repealed effective Dec. 18, 1971, subject to pending applications, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988)). Lawrence originally applied for approximately 160 acres of land "at the head of Neka Bay about 2 miles back

from the mouth of the river" on Chichagof Island in southeastern Alaska. In a September 1, 1915, affidavit corroborated by two witnesses, he claimed use and occupancy of the land since 1895. The Superintendent of Schools, Alaska School Service, Bureau of Education, Department of the Interior, attested to Lawrence's occupancy and use of the land during a part of each year for gardening, fishing, and hunting, and recommended that his application be approved. See Circular No. 491, 45 L.D. 227, 246 (1916). He reported there was an old fish house on the land.

The land was included in the "Alexander Archipelago Forest Reserve" created by Proclamation No. 37 on August 20, 1902. See 32 Stat. 2025 (1902). Acting under section 24 of the Act of March 3, 1891, ch. 561, 26 Stat. 1103, President Roosevelt "reserved [the affected land, subject to valid existing rights,] from settlement, entry or sale" (32 Stat. 2025). The Reserve was subsequently incorporated in the Tongass National Forest pursuant to Executive Order dated July 2, 1908, which preserved the reservation. Inclusion within the National Forest would not, however, prevent allotment to Lawrence's heirs were his occupancy found to precede establishment of the Forest. See 43 U.S.C. § 270-2 (1970); Yakutat & Southern Railway v, Harry, 48 L.D. 362, 364 (1921).

The land was surveyed in July 1920. The survey located the allotment claim "on [the] right bank of the Neka River about 1[-]1/2 miles from [its] mouth," but found no improvements on the land. See Exhibit "A" attached to Letter to Commissioner, General Land Office (GLO),from Special Agent, dated July 14, 1924. The survey (U.S. Survey No. 1182), approved April 18, 1921, returned 35.49, instead of 160 acres. Lawrence died on June 7, 1922. The allotment claim was investigated by GLO, predecessor to BLM, in June 1924. An investigator examined the claim on the ground, finding no improvements, and interviewed Lawrence's widow (who the record indicates died in 1946) at her place of employment in Port Althorp, Alaska, recording that she admitted she had been unable to make any improvements. See Letter to Commissioner, GLO, from Special Agent, dated July 14, 1924. He then recommended that the allotment application be rejected. The application was held for rejection for this reason by decision dated October 4, 1924, that allowed 30 days from notice of the decision for an appeal. The decision was received by Lawrence's widow on November 28, 1924. There being no appeal, GLO rejected the allotment application on May 19, 1925.

BLM reinstated the allotment application on July 9, 1980. On December 2, 1980, Congress enacted section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), which provided, subject to valid existing rights and certain exceptions, that Native allotment applications pending before the Department on or before December 18, 1971, describing land that was unreserved on December 13, 1968, were approved on the 180th day following passage of ANILCA on December 2, 1980. The subject application was deemed to have been pending on or before December 18, 1971, although it was rejected in 1925, because GLO rejected the application without granting Lawrence's heirs an opportunity for hearing concerning the disputed question of fact whether their ancestor had complied with the Allotment Act as required by Pence v. Kleppe, 529 F.2d 135, 142-43 (9th Cir. 1976). See Ellen Frank, 124 IBLA 349, 351 (1992).

On June 1, 1981, the State of Alaska filed a protest, pursuant to section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1988). Even though the protest was subsequently withdrawn on June 30, 1982, this filing prevented legislative approval of the allotment application as provided by section 905(a)(1) of ANILCA, and required that the application be adjudicated pursuant to the requirements of the Act of May 17, 1906. Stephen Northway, 96 IBLA 301, 306 (1987). BLM erroneously closed the case on March 2, 1984. The application was again reinstated on January 16, 1987. During the 1980's and early 1990's, BLM consistently placed the 35.49-acre allotment claim in the protracted N½ sec. 17, T. 44 S., R. 59 E., Copper River Meridian, Alaska. The surveyed location is shown on master title plats (MTP), dated August 14 and December 8, 1980, March 22 and April 30, 1984, January 26, 1987, and April 16, 1990, with the tip of the allotment claim touching the waters of Neka Bay. The MTP of February 12, 1992, however, was drawn to show a 160-acre allotment claim surrounding the surveyed location in the protracted N½ sec. 17.

The June 1992 decision here on review reinstated the subject applica- tion, described as encompassing approximately 160 acres of land in sec. 17, for the reason that it was rejected in 1925 without giving the applicant an opportunity for hearing as required by the court in Pence. BLM found that the earlier reinstatement had been made without notice to interested parties. It was therefore determined that the June 1992 decision would "serve as formal notice to all interested parties of the reinstatement" (Decision at 1). BLM also provided that the State and other interested parties would, pursuant to section 905(a)(5) of ANILCA, have 60 days from issuance of the decision to protest the application. When the June 1992 decision issued, the time for filing protests under section 905(a)(5) of ANILCA had passed. Nonetheless, BLM apparently took this action under another provision of the statute, section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), which provides that if the Secretary seeks to correct the location of an allotment claim, he shall notify the State and all interested parties of the intended correction and any party

> shall have until * * * sixty days following mailing of the notice * * * to file with the Department * * * a protest as provided in subsection (a)(5) of this section, which protest, if timely, shall be deemed filed within one hundred and eighty days of December 2, 1980, notwithstanding the actual date of filing.

BLM invoked this section because, by reinstating Lawrence's original application, it had corrected the allotment location from that shown on the MTP's by returning the Lawrence claim to the original 160-acre configuration. The record indicates that BLM then scheduled another field examination in order to assess, prior to adjudication of the application, compliance with use and occupancy requirements of the Act of May 17, 1906. This was done because the June 1924 GLO investigation was limited to the smaller 35.49-acre survey area. This action was proper. See State of Alaska, 119 IBLA 260, 264, 264 n.7, 267, 271 (1991). The Forest Service has appealed from the June 1992 BLM decision.

The Forest Service objects to reinstatement of the allotment applica- tion only to the extent that it has been expanded to encompass 160 acres of land, a configuration that conflicts with planned timber harvesting. The Forest Service states that from 1987 until 1992, it relied on the original surveyed location of the allotment claim, as shown on MTP's, in order to locate harvest units and associated road construction. The result is that the 160-acre allotment claim now before us conflicts with a harvest unit and road construction approved by the Forest Service on November 17, 1987. The Forest Service contends that BLM is bound by the notation on the MTP's limiting the claim to 35.49 acres as shown in U.S. Survey No. 1182 in the absence of any prior public notice to the contrary. In the alternative, the Forest Service argues that the Board should find the allotment applica- tion was properly rejected in 1925 and no purpose would now be served by adjudicating the claim, since whether Lawrence had satisfied the statutory requirements was fully investigated in the 1920's and the applicant is no longer alive.

[1] BLM is required by section 905(a) of ANILCA to reinstate, for purposes of either legislative approval or adjudication, any Native allotment application that was rejected by the Department without an opportunity for a hearing on a disputed question of fact, as required in 1976 by the Federal appeals court in Pence. See S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5182; Ellen Frank, supra at 351-52. This is so even if an applicant was notified of an earlier rejection and no appeal was taken, since lack of compliance with Pence vitiates the administrative finality that would otherwise attend the rejection. Heirs of George Titus, 124 IBLA 1, 4 (1992). In this case, the record establishes that no hearing was offered Lawrence's heirs prior to the 1925 GLO rejection of his allotment application. Consequently, BLM properly reinstated the application in 1987. Heirs of Saul Sockpealuk, 115 IBLA 317, 326 (1990). As a result, BLM is now obliged to again adjudicate the merits of the allotment claim, even though this may prove difficult because of the lapse of time. See Ellen Frank, supra at 351-52.

The question presented by the instant appeal is whether the subject application should be limited to the survey noted on the MTP'S. We can find no justification for this restriction. According to the record, Lawrence initiated use and occupancy of a 160-acre tract of land in 1895. His occupancy of the land afforded him an inchoate preference right, which continued so long as he occupied the land. See United States v. Flynn, 53 IBLA 208, 225-26, 234, 88 I.D. 373, 382-83, 387 (1981). The preference right vested with the filing of his application in 1915, assuming there was compliance with the Act of May 17, 1906. Id. It thereafter served to segregate the land from other entry. See Circular No, 749, 48 L.D. 70, 72 (1921); 43 CFR 2561.1(e).

The application was not amended by the applicant or his heirs. Instead, in 1920 GLO surveyed the allotment claim and altered the described boundaries to substantially reduce the acreage covered by the claim. There is no evidence that the GLO surveyor was accompanied by a representative of Lawrence. The result was that the northern, southern,

and eastern boundaries, which had all been described in Lawrence's 1915 application as one-half mile (or 40 chains) long, were surveyed in 1920 as 12.39, 40, and 12.39 chains long, shrinking the claim from about 160 to 35.49 acres. There is no justification for this reduction in the record. Nor is there evidence that Lawrence or his heirs were ever notified, following approval of the survey in April 1921, that his allotment claim had been surveyed or that the survey had reduced the size of his claim. The June 1924 field investigation of the claim was conducted by a special agent of GLO and an employee of the Forest Service. See Letter to Commissioner, GLO, from Special Agent, dated July 14, 1924, at 2. There is no evidence that any representative of the applicant was present to verify the location of the claim, nor is there any evidence that GLO or BLM ever sought to obtain the consent of Lawrence or his heirs to amend the allotment application to conform to the surveyed location.

When providing an Alaskan Native his rights under the Act of May 17, 1906, the Department must be guided by his original intent, whether acting pursuant to the amendment authority in section 905(c) of ANILCA or similar pre-existing authority. See Hermann T. Kroener, 124 IBLA 57, 59-60 n.6, 64-65 (1992). Upon passage of section 905(a) of ANILCA, BLM was required to reinstate the allotment application. That application was the original application filed by Lawrence and rejected by GLO without opportunity for a hearing. It covered the 160-acre tract of land originally sought by him. GLO lacked authority to unilaterally amend that application by survey to encompass land other than that claimed by the applicant. We have so ruled in construing the Department's authority under section 905(c) of ANILCA. Hermann T. Kroener, 124 IBLA at 64-65. That ruling is equally applicable under the amendment authority reposed in the Department prior to ANILCA and now embodied in section 905(c) of that statute. Id. at 59-60 n.6. There is no evidence in the record that the 35.49-acre surveyed tract was the only land Lawrence originally intended to claim.

The Forest Service invokes the so-called "notation rule" as a means of preventing reinstatement of the allotment claim in its original location. The notation rule does not, however, open to entry land that is erroneously shown to be open. Under the notation rule, land that is shown in error by the public land records to be closed to appropriation will not be considered open to a conflicting entry so long as the notation remains of record, in order to afford all members of the public an equal opportunity to enter the land. B. J. Toohey, 88 IBLA 66, 77-82, 92 I.D. 317, 324-26 (1985), and cases cited therein. Consequently, the original 160-acre Lawrence claim remained subject to the allotment application and was closed to entry after reinstatement of the application on January 16, 1987. See 43 CFR 2561.1(e). It remained subject to the application when the Forest Service approved timber harvesting and road construction on the land in November 1987, and should have been avoided by the Forest Service planners.

We cannot say that no purpose would be served by again adjudicating the validity of the original allotment application. The June 1924 GLO investigation considered only the reduced area surveyed in 1920. See Letter to Commissioner, GLO, from Special Agent, dated July 14, 1924, at 2. Because

it did not encompass the full 160-acre tract claimed by Lawrence, the case may benefit from another field examination, followed by another adjudication. (The record indicates that BLM has already obtained the October 20, 1989, affidavit of James Osborne, Sr., Lawrence's grandson, who states that his mother reported to him that Lawrence had used "his land in Neka Bay" for hunting, trapping, berry picking, fishing, and food preserving.) More importantly, the Lawrence application was rejected by GLO because the land encompassed by the allotment claim was found to lack improvements. See Letter to Register and Receiver, from Assistant Commissioner, GLO, dated Oct.4, 1924. But there was no requirement in the Act of May 17, 1906, that an applicant construct improvements on claimed land. See 34 Stat. 197 (1906). Therefore, GLO used an incorrect legal standard to determine whether the application was valid, even were it confined to the 35.49-acre survey. Finally, no consideration was given by GLO to whether the applicant had complied with the statutory requirements added by section 1(e) of the Act of August 2, 1956, ch. 891, 70 Stat. 954, and its implementing regulations (43 CFR Subpart 2561), that require an applicant to demonstrate he has engaged in substantially continuous use and occupancy for 5 years. See 43 U.S.C. § 270-3 (1970).

Therefore, we conclude that BLM properly reinstated the original Native allotment application of Archie Lawrence (A-02493), and may now adjudicate the validity of the original 160-acre allotment claim. If the application is rejected, Lawrence's heirs must be provided an opportunity fora hearing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge